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June 30, 2015

Via Electronic Mail To: bill.thompson@courts.mo.gov

Mr. Bill L. Thompson
Clerk, Supreme Court of Missouri
P.O. Box 150
Jefferson City, MO 65102

Re: Municipal Courts

Dear Mr. Thompson:

Per your letter to me on March 31, 2015, the Advisory Committee has been considering the issues surrounding municipal courts as to how the multiple roles by attorneys impact the negative perception of the impropriety and independence of judges. A subcommittee was appointed to consider these concerns, and to explore if changes to the Rules of Professional Conduct would address those concerns. The subcommittee was chaired by Richard Banks, and included Susan Appelquist, John Briscoe, Alvin Brooks, and Doreen Dodson.

At a meeting on June 30, 2015, the Advisory Committee considered the attached report and recommendation of the subcommittee, and voted to adopt it in whole. I am forwarding this to you to share with the members of the Court.

Please let me, or the members of the subcommittee, know if you have any questions about this report and recommendation. The Advisory Committee thanks you for the opportunity to consider these issues.

Sincerely,



Jennifer Gille Bacon
Chair, Advisory Committee

c: Melinda Bentley

CONFIDENTIAL MEMORANDUM

To: Members of the Advisory Committee of the Supreme Court of Missouri

**From: Subcommittee on Municipal Courts Members: Richard Banks, Chair, Susan Appelquist, John Briscoe, Alvin Brooks, & Doreen Dodson
Melinda J. Bentley, LEC & Sandra J. Colhour, ALEC**

Date: June 22, 2015

Re: Report and Recommendation on Municipal Courts and the Missouri Rules of Professional Conduct

I. Overview

On March 31, 2015, Bill Thompson sent a letter to Jennifer Bacon, Advisory Committee Chair, which stated:

Recent events have highlighted the multiple roles that some attorneys take in municipal division cases. In light of increasing indications that the situation is abused by a few and results in a negative effect on the perception of impropriety and independence of judges, the Court would appreciate receiving the Advisory Committee's views on whether, going forward, the Rules of Professional Conduct should be changed and, if so, any suggestions as to what those changes should include. The committee, of course, may conclude that no changes would be helpful.

This subcommittee has studied how the Rules of Professional Conduct address multiple roles by attorneys in municipal division cases and the part those multiple roles may play in contributing to the negative effect on the public perception of impropriety and lack of independence by judges. While the subcommittee shares the Court's concerns about the negative perceptions by the public, the subcommittee does not believe that a change to the Rules of Professional Conduct is the proper method to address those specific concerns. As such, the subcommittee recommends to the Advisory Committee no change to the Rules of Professional Conduct. The subcommittee has studied outside

reports analyzing the municipal court in Ferguson, numerous media reports, the Rules of Professional Conduct, and existing Missouri Informal Advisory Opinions, as well as the related Code of Judicial Conduct. The subcommittee notes that geography seems to be one of the largest factors in the perception concerns. While the Rules of Professional Conduct are not suited to address these geographic concerns, the subcommittee notes that the Code of Judicial Conduct does have geographic limitations related to the practice of law by part-time municipal judges. The subcommittee observes that two other states have greater geographic limitations for part-time judges through judicial conduct rules and opinions,¹ and suggests that the Code of Judicial Conduct, though outside the jurisdiction of the Advisory Committee, may be a more appropriate avenue in which to address the concerns. In support of this recommendation that the Rules of Professional Conduct not be amended, the subcommittee submits the following report for the consideration of the full Advisory Committee.

II. Analysis of the Perception of Impropriety by the Public and Media, Reports Examining the Municipal Court System in Ferguson in the Context of Multiple Roles by Attorneys, and the Missouri Rules of Professional Conduct

A. The public and media reports do not raise substantive allegations of improper conflicts of interest as defined by the Rules of Professional Conduct.

This report will not attempt to restate the many public and media articles that express concerns about the perception of impropriety. The subcommittee believes that those articles, while valid in reflecting the existence of the public's concerns about perceptions, do not address the substantive issues in the context of the Rules of Professional Conduct, which are the only issues on which the Advisory Committee has the authority to make recommendations to the Court. The subcommittee feels it is important to point out that while the public and media are using the term "conflict of

¹ Detailed in section IV of this Memorandum.

interest” frequently to describe the concerns about impropriety, under the Rules of Professional Conduct, a “conflict of interest” regarding multiple roles by attorneys is a specific ethical standard which will be addressed further in section III of this memorandum. The subcommittee focused on two reports that have recently examined the operations of municipal court systems in the context of Ferguson, Missouri to see if those reports address any issues specifically related to the conduct of multiple roles of attorneys under the Missouri Rules of Professional Conduct.

B. The Department of Justice report does not contain findings of improper conflicts of interest as defined by the Rules of Professional Conduct.

The first report considered is the Department of Justice Investigation of the Ferguson Police Department, from March 4, 2015, as it explicitly addressed municipal court practices. That report did not cite to any type of “conflict of interest” on the part of the attorneys or judges involved in the process, or any other issues related specifically to multiple roles of attorneys in the context of the Rules of Professional Conduct. Instead, that report focused on issues which included transparency, accuracy of information, court procedures, and other practices that gave rise to due process concerns. In fact, that report states: “[t]he impact that revenue concerns have on court operations undermines the court’s role as a fair and impartial judicial body.”² The basis of that report addressed those numerous concerns centered on the overall operations of the municipal process, and noted the roles the prosecuting attorney and judge had in that process. However, the report did not address the issue of multiple roles by attorneys in the context of the municipal division cases such that the Rules of Professional Conduct would be implicated, so the subcommittee did not further consider that report within the scope of the inquiry presented by the Court.

² “Department of Justice Investigation of the Ferguson Police Department,” March 4, 2015, p. 42.

C. The Office of State Courts Administrator's (OSCA) report does not cite any conflicts of interest as defined by the Rules of Professional Conduct.

The second report considered by the subcommittee was “A Report by the State Courts Administrator’s Office and Judge Roy L. Richter to the Supreme Court of Missouri Concerning Ongoing Efforts to Improve the State’s Municipal Divisions,” from May 11, 2015. That report is, again, in the context of the municipal court system in Ferguson, Missouri. That report largely focuses on improving the court’s policies and procedures, but it does describe “potential conflicts of interest” concerning court operations.³ However, without restating the concerns in the report, the subcommittee noted that the “potential conflicts of interest” were not in the context of the Rules of Professional Conduct, but instead had to do with separation of the various government roles between the judicial and executive branches.⁴

D. The subcommittee is unaware of any data that expanding the Rules of Professional Conduct definition of “conflict of interest” to prohibit attorneys from having multiple roles in different municipal courts would improve judicial independence or public perception of impropriety.

While the subcommittee is aware of the various public and media assertions of conflicts of interest from attorneys fulfilling multiple roles in different municipal courts, none of those reports, nor the reports by the Department of Justice or OSCA, have cited any conflicts of interest as defined by the Rules of Professional Conduct. The subcommittee is aware of no data or analysis that suggests that prohibiting attorneys, through the Rules of Professional Conduct, from serving as prosecutors and judges in

³ “A Report by the State Courts Administrator’s Office and Judge Roy L. Richter to the Supreme Court of Missouri Concerning Ongoing Efforts to Improve the State’s Municipal Divisions,” May 11, 2015, p. 16.

⁴ “A Report by the State Courts Administrator’s Office and Judge Roy L. Richter to the Supreme Court of Missouri Concerning Ongoing Efforts to Improve the State’s Municipal Divisions,” May 11, 2015, p. 16.

different municipal courts, would address any public perception of impropriety, cure any deficiencies in municipal court operations as cited in the Department of Justice Report, or remedy the separation of powers concerns raised by the OSCA report.

III. Multiple Roles by Attorneys in Municipal Division Cases and Conflicts of Interest under the Missouri Rules of Professional Conduct

A. Roles of Individual Attorneys

There are three primary roles for attorneys within the context of municipal representations: (1) part-time municipal prosecutors; (2) part-time municipal judges; and (3) defense attorneys. In all of these roles, conflicts of interest ascribed to individual attorneys are imputed back to the law firms in which these attorneys and judges practice through Rules of Professional Conduct 4-1.10, 4-1.9(b) and (c), and 4-1.11(b).⁵

The subcommittee feels it is important to note the two most common definitions of conflicts of interest under the Missouri Rules of Professional Conduct. First, concurrent client conflicts of interest are addressed in Rule 4-1.7. Attorneys are prohibited from representing clients if the representations will be directly adverse to other clients, or if there is a significant risk that the representation of one or more clients will be materially limited by the attorneys' responsibilities to other clients, former clients, third persons, or by personal interests of the attorneys.⁶ Notwithstanding such conflicts, attorneys may ethically undertake such representations if there is a reasonable belief that they can provide competent and diligent representation to each affected client, if the representation is not prohibited by law, if it does not involve a claim by one client against another client

⁵ See Missouri Informal Advisory Opinions 970111, 970068, 950186, 950176, 940062, and 930104 at <http://www.mobar.org/ethics/informalopinions.htm>, and attached as Exhibit A.

⁶ Mo. Sup. Ct. Rule 4-1.7(a).

in the same litigation or proceeding before a tribunal, and if the written informed consent is secured by each affected client.⁷

Second, Rule 4-1.9 extends similar protections to former clients when it comes to conflicts of interest. Attorneys are prohibited from representing clients when they have formerly represented clients in matters that are the same or substantially related and in which the interests of the new clients are materially adverse to those of the former clients, unless the former clients give informed written consent.⁸ Further, attorneys are prohibited from using information related to the prior representation to the disadvantage of former clients, or from revealing information relating to the representation unless otherwise permitted by the Rules with respect to clients.⁹

1. Attorneys as Part-Time Municipal Prosecutors

Under the Rules of Professional Conduct, questions as to the conflicts of interest of part-time municipal prosecutors are analyzed under Rules of Professional Conduct 4-1.7 through 4-1.11. The principles of protecting against conflicts of interest are based on the need for loyalty and independent professional judgment in each attorney-client relationship.¹⁰ To the extent any of the municipal charges may be considered to be criminal in nature, Rule 4-3.8 would apply as to the special responsibilities of a prosecutor.

⁷ Mo. Sup. Ct. Rule 4-1.7(b).

⁸ Mo. Sup. Ct. Rule 4-1.9(a).

⁹ Mo. Sup. Ct. Rule 4-1.9(c)

¹⁰ Mo. Sup. Ct. Rule 4-1.7, Comment [1].

2. Attorneys as Part-Time Municipal Judges

The Code of Judicial Conduct specifically makes provisions for part-time municipal judges in Rule 2, Application, III, and permits the private practice of law,¹¹ but within the geographic restrictions set forth in paragraph (B). That paragraph states that the part-time municipal judge shall not:

- (1) practice law in the municipal division of the circuit court on which the judge serves;
- (2) act as a lawyer in any matter wherein any underlying facts occurred within the geographic boundaries of the political subdivision for which the judge serves and which matter could be brought by a proceeding in the municipal division of the circuit court in which the judge serves; or,
- (3) act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

This subcommittee notes that, although it references the Code of Judicial Conduct, the subcommittee cannot interpret the Code, as such authority rests with the Missouri Commission on Retirement, Removal, and Discipline of Judges. The subcommittee simply notes this provision allows for the private practice of law by part-time municipal judges within certain geographic constraints. The practice of law by attorneys would be analyzed in the context of the Rules of Professional Conduct. (See section III.A., above.)

3. Attorneys Defending Clients Who Face Municipal Charges

Under the Rules of Professional Conduct, questions as to the conflicts of interest of attorneys defending clients in municipal matters are analyzed under Rules 4-1.7 through 4-1.11. (See section III.A., above.)

¹¹ Mo. Sup. Ct. Rule 2, Application, III, (A)(1).

B. Informal Advisory Opinions, the Rules of Professional Conduct, and Attorneys in Multiple Roles

When providing an opinion on the conduct of an attorney who is also a part-time municipal judge, the Missouri Informal Advisory Opinions have often noted the geographic limitations set forth in the Code of Judicial Conduct, Rule 2, Application, III (B), but defer interpretation of the Code to the Commission on Retirement, Removal and Discipline of Judges. Those Informal Advisory Opinions do address the private practice of law by part-time municipal judges, and when part-time municipal judges may also serve as a prosecutor or defense counsel in other municipalities. While multiple roles within the same municipal court are prohibited by the Code of Judicial Conduct's geographic limitations, and the Rules of Professional Conduct's limits on direct adversity under 4-1.7(a), the Rules of Professional Conduct generally permit attorneys to assume different roles in separate municipal courts, so long as appropriate safeguards against conflicts of interest are followed per Rules 4-1.7 through 4-1.11.¹²

Further, the Rules of Professional Conduct prohibit all attorneys from engaging in conduct intended to improperly influence a tribunal,¹³ knowingly disobeying an obligation under the rules of the tribunal,¹⁴ engaging in conduct prejudicial to the administration of justice,¹⁵ or assisting a judge in violating the Code of Judicial Conduct.¹⁶

¹² See Missouri Informal Advisory Opinions 20010045, 970074, 950247, 950217, 950076, 950067, and 940144 at <http://www.mobar.org/ethics/informalopinions.htm>, and attached as Exhibit B.

¹³ Mo. Sup. Ct. Rule 4-3.5.

¹⁴ Mo. Sup. Ct. Rule 4-3.4(c).

¹⁵ Mo. Sup. Ct. Rule 4-8.4(d).

¹⁶ Mo. Sup. Ct. Rule 4-8.4(e).

The subcommittee believes that the perception issues related to the multiple roles (i.e. a single attorney serving as a municipal judge in one municipality and a municipal prosecutor or defense attorney in another municipality) are primarily based on geography. In some areas of the state, municipalities may be extremely small. For example, the 21st Judicial Circuit contains 84 municipal divisions, including one for the unincorporated regions of St. Louis County.¹⁷ However, the 22nd Judicial Circuit only has one: the St. Louis City Municipal Division.¹⁸ The 16th Judicial Circuit has 18 municipal divisions, including one for Jackson County,¹⁹ and the 31st Judicial Circuit has only 8 municipal divisions.²⁰ The subcommittee suggests that the existence of 84 municipal courts in a single judicial circuit may contribute to the negative perceptions expressed by the public and media. However, the subcommittee must focus on the three roles attorneys can play in the municipal court process, and consider the ethical restrictions already in place under the Rules of Professional Conduct. The subcommittee does not believe that any changes to the Rules would impact, as Mr. Thompson states in his letter, the “negative effect on the perception of impropriety and independence of judges.” Instead, the subcommittee felt it incumbent to consider other possible areas to address these concerns, such as the Code of Judicial Conduct, due to its interplay with the Rules of Professional Conduct, for those part-time municipal judges who also engage in the private practice of law.

¹⁷ Source: <https://www.courts.mo.gov/page.jsp?id=1908>, visited June 17, 2015.

¹⁸ Source: <https://www.courts.mo.gov/page.jsp?id=9099>, visited June 17, 2015.

¹⁹ Source: <https://www.courts.mo.gov/page.jsp?id=1901>, visited June 17, 2015.

²⁰ Source: <https://www.courts.mo.gov/page.jsp?id=1912>, visited June 17, 2015.

IV. Examples of Geographic Limitations in Other States through the Code of Judicial Conduct

The subcommittee does note for the Advisory Committee's information that, based on its research, at least two states have sought to limit geographically the roles attorneys may undertake, but both are through the states' Codes of Judicial Conduct. First, the Code of Judicial Conduct contained in the New York State Court Rules, Section 100.6(B)(2), prohibits a part-time judge from "practic[ing] law in the court on which the judge serves, or in any other court in the *county* in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto." (emphasis added) Second, Canon 2(A) of the Georgia Code of Judicial Conduct states: "Judges shall respect and comply with the law and shall conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Georgia Advisory Opinion 181 (1993) has interpreted that provision to restrict a part-time State Court Judge from serving as a Municipal Court Solicitor, which is later described in the opinion as a prosecutor, in the context of this Canon 2(A).

V. Conclusion

Based on the subcommittee's review of various media reports on the municipal courts in the St. Louis area, the Department of Justice Investigation of the Ferguson Police Department, from March 4, 2015, as it specifically addresses the municipal court practices, the "Report by the State Courts Administrator's Office and Judge Roy L. Richter to the Supreme Court of Missouri Concerning Ongoing Efforts to Improve the State's Municipal Divisions," from May 11, 2015, an examination of the Missouri Rules of Professional Conduct, and Missouri's Informal Advisory Opinions, this subcommittee does not find that a change to the Rules of Professional Conduct would address the "negative effect on the perception of impropriety and independence of judges." It is the

opinion of this subcommittee that such concerns may be addressed outside the Rules of Professional Conduct, such as through changes to other items to be studied by the Supreme Court Municipal Division Work Group. This subcommittee stands ready to assist that Work Group, if asked.

Thank you for your consideration.

CONFIDENTIAL

Exhibit A

Opinion Number: 970111 - Rule Number: 1.7

QUESTION: Question 1. Attorney serves as part-time municipal judge. May a member of Attorney's firm represent a criminal defendant in a state prosecution filed in circuit or associate circuit court where the events giving rise to the prosecution take place within the city limits. Nothing related to the case has been filed in municipal court. Question 2. Attorney serves as a part-time municipal judge. May Attorney represent a defendant in a state prosecution filed in circuit court arising from events which occurred within the city limits. Nothing related to the case has been filed in municipal court. Question 3. The circumstances are exactly the same as in question 1 except, there are other persons charged in a matter arising from the same events who are currently being prosecuted by the city in municipal court. Will recusal of Attorney as judge on the related municipal cases allow Attorney's associate to accept the representation?

ANSWER: Answer 1. Yes. Answer 2. Yes. Answer 3. No. The associate would violate Rule 4-1.7. For an opinion related to Supreme Court Rule 2, the Code of Judicial Conduct, the part-time municipal judge should contact the Commission on Retirement, Removal and Discipline of Judges.

Opinion Number: 970068 - Rule Number: 1.7

QUESTION: Attorney is a part time municipal judge. May members of Attorney's firm represent defendants in municipal court if Attorney recuses on those cases?

ANSWER: It would be a conflict for any member of Attorney's firm to oppose the city in municipal court matters while Attorney is Municipal Judge for the city. This opinion only relates to the Rules of Professional Conduct for attorneys. Attorney would need to contact the judicial commission for an opinion related to the Code of Judicial Conduct.

Opinion Number: 950186 - Rule Number: 1.10

QUESTION: Several attorneys have formed a firm but they do not share profits. One member of the firm is a municipal judge. May other members of the firm represent clients in municipal zoning matters?

ANSWER: No. Once the attorneys have formed a firm, the provisions of Rule 4-1.10 apply regardless of the internal financial arrangements. Therefore, the conflicts of each member of the firm are conflicts for all members of the firm.

Opinion Number: 950176 - Rule Number: 1.7(a)

QUESTION: A member of the firm is the city attorney but not the city prosecutor. May other members of the firm represent defendants in municipal court?

ANSWER: The members of the firm may not represent defendants in municipal court in the municipality in which a firm member is the city attorney. If a member of the firm is the city attorney, the city is a client of a member of the firm. By representing defendants in the city's municipal court, members of the firm would be representing clients (municipal defendants) directly adverse to the interests of another client (the city) in violation of Rule 4-1.7(a).

Opinion Number: 940062 - Rule Number: 1.7;1.10

QUESTION: One member of the firm is a part time municipal judge. Another member has a case in which the city is a defendant. Is this a conflict? Can it be waived?

ANSWER: Yes, it is a conflict and the member must withdraw from the case. As a governmental entity, the city cannot waive the conflict.

Opinion Number: 930104 - Rule Number: Code of Judicial Conduct

QUESTION: A member of the firm is a municipal judge in one municipality. The firm handles municipal cases in other municipalities. Is this a conflict?

ANSWER: It is not a conflict under the Rules of Professional Conduct for attorneys. However, this office cannot give opinions on the Code of Judicial Conduct. Also, the judge and the firm members should be alert to the fact that conflicts could arise if the judge substitutes for another municipal judge.

EXHIBIT B

Opinion Number: 20010045 - Rule Number:

QUESTION: May Attorney, who is also a part time municipal judge, represent persons charged in other courts with crimes that are alleged to have occurred inside the municipal boundaries?

ANSWER: No, if there is any possibility that the person could be charged with a municipal offense based on the same conduct.

Opinion Number: 970074 - Rule Number: 1.7(b)

QUESTION: Attorney is the municipal prosecutor. May Attorney prosecute municipal cases against municipal employees, including police officers?

ANSWER: Attorney has a conflict of interest under Rule 4-1.7(b), when the defendant is a police officer. The conflict derives from the necessity that Attorney, as municipal prosecutor, be able to rely on, and work with, the members of the police department in Attorney's role as municipal prosecutor. Attorney may not have a conflict regarding non-police municipal employees if the particular employee is not one with whom Attorney must work regularly in Attorney's role as municipal prosecutor. Therefore, those situations will be dependent on the particular situation.

Opinion Number: 950247 - Rule Number: 1.7

QUESTION: May Attorney serve as a municipal judge and as an assistant prosecutor in another county?

ANSWER: Yes, under the Rules of Professional Conduct. However, this office cannot provide Attorney with an opinion regarding Supreme Court Rule 2, the Code of Judicial Conduct. Attorney should contact the Judicial Commission for an opinion from that standpoint.

Opinion Number: 950217 - Rule Number: 1.7

QUESTION: Question 1. May a part time municipal judge defend cases in that municipal court? Question 2. May a part time municipal judge defend criminal cases in circuit court if the case arose within the municipality? Question 3. May the partner of a part time municipal judge defend cases in that municipal court before another judge?

ANSWER: Answer 1. No. Answer 2. No. Answer 3. No.

Opinion Number: 950076 - Rule Number: 1.7

QUESTION: May Attorney serve as municipal prosecutor for city A and as municipal judge for city B if both are within the same county?

ANSWER: This general situation does not create a conflict of interest under the rules. A conflict of interest could arise in specific situations. This does not constitute an opinion regarding the Code of Judicial Conduct. Attorney would have to contact the Commission on Retirement, Removal and Discipline of Judges to request an opinion from that perspective.

Opinion Number: 950067 - Rule Number: 1.7

QUESTION: Attorney is a city prosecutor for city A. Attorney also represents defendants in municipal court in city B. Does Attorney have a conflict of interest if city A and city B have the same municipal judge?

ANSWER: Attorney would not be involved in a conflict of interest because the municipal judge and the municipal prosecutor should have no relationship beyond that of any other attorney appearing before the judge. If a greater relationship exists, that relationship would create a conflict of interest regardless of the specific factual circumstances described.

Opinion Number: 940144 - Rule Number: 1.7

QUESTION: May Attorney function as a prosecuting attorney for a municipality and also function as a municipal judge for another municipality within the same county?

ANSWER: Yes. Attorney should also ask for an opinion from the judicial commission regarding the application of the Code of Judicial Conduct to the situation.